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10  
11 IN THE UNITED STATES DISTRICT COURT  
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
13 SAN JOSE DIVISION

14 **MARVIN G. HOLLIS,**

15 Plaintiff,

16 v.

17 **ELOY MEDINA,**

18 Defendants.  
19

C 07-2980 THE (PR)

**DEFENDANT'S NOTICE OF  
MOTION AND MOTION TO  
DISMISS AND MOTION FOR  
QUALIFIED IMMUNITY**

20 TO PLAINTIFF MARVIN G. HOLLIS, PRO SE:

21 PLEASE TAKE NOTICE that defendant E. Medina (Defendant) moves the Court to  
22 dismiss this action under unenumerated Rule 12(b) and Rule 12(b)(6) of the Federal Rules of  
23 Civil Procedure and for Qualified Immunity because Plaintiff Marvin G. Hollis (Plaintiff) failed  
24 to exhaust his administrative remedies before filing this action, as required by the Prison  
25 Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a), and failed to state a claim for relief against  
26 Defendant.

27 PLEASE TAKE FURTHER NOTICE that the Court may look beyond the pleadings and  
28

1 decide disputed issues of fact when ruling on Defendants' non-enumerated Rule 12(b) motion for  
 2 failure to exhaust administrative remedies. *Wyatt v. Terhune*, 315 F.3d 1108, 1119-20 (9th Cir.  
 3 2003). Plaintiff may provide evidence to the Court to dispute that which is presented by  
 4 Defendants. *Id.* at n.14.

5 This motion is based on this Notice, the following Memorandum of Points and  
 6 Authorities, the declarations and exhibits filed in support of this motion, the proposed order, and  
 7 the pleadings and records on file with the Court in this action.

## 8 **MEMORANDUM OF POINTS AND AUTHORITIES**

### 9 **ISSUE PRESENTED**

10 The PRLA requires an inmate to properly exhaust administrative remedies before filing  
 11 civil-rights suits concerning prison conditions and to state a proper claim for relief upon which  
 12 relief can be granted. Plaintiff's appeal was not exhausted because he did not complete the final  
 13 level of review and failed to state a claim for relief in his complaint. Should this Court dismiss  
 14 this action because Plaintiff failed to properly exhaust his administrative remedies and failed to  
 15 state a claim for relief?

### 16 **SUMMARY OF ARGUMENT**

17 The Plaintiff cannot satisfy the PLRA's administrative remedies exhaustion requirement  
 18 because the administrative appeal received no final Director's level review, and therefore did not  
 19 properly exhaust all available administrative remedies. Under *Ramirez v. Galaza*, 334 F.3d 850,  
 20 860 (9th Cir. 2003), Plaintiff failed to state a claim for relief against Defendant.

### 21 **STATEMENT OF THE CASE**

22 Plaintiff Marvin G. Hollis, CDCR number E-37508, is a state prisoner currently  
 23 incarcerated at High Desert State Prison. On June 7, 2007, Plaintiff filed this action under 42  
 24 U.S.C. § 1983. This Court screened Plaintiff's complaint under the PLRA, and recognized one  
 25 claim.

26 Claim one is an First Amendment claim against Salinas Valley State Prison Appeals  
 27 Coordinator, E. Medina, for denying his 602 appeals in retaliation for Plaintiff's status as a  
 28 "jailhouse lawyer" and his prior filing of administrative grievances. (Order of Initial Review,



1 Docket No. 3, dated Nov. 27, 2007, 2:9-11.)

## 2 STATEMENT OF FACTS

3 Plaintiff alleges that Defendant, in his capacity as Appeals Coordinator, retaliated against  
4 him by improperly screening a prior Rules Violation Report (115) appeal because Plaintiff is a  
5 "jailhouse lawyer" and for prior use of the 602 appeals procedure. (Compl., at 2(b) ¶ 5-9.)

6 On April 18, 2005, Plaintiff received a Rules Violation Report, number FC05-04-0049,  
7 for battery on a peace officer. On January 5, 2006, after the investigation, Plaintiff received the  
8 final Rules Violation Report finding that he was guilty of battery on a peace officer. (See Medina  
9 Decl. ¶ 5, Ex B.) Plaintiff appealed the Rules Violation Report, number FC05-04-0049, for  
10 battery on a peace officer. (See Medina Decl. ¶ 6, Ex C.) The first level of review for appeal  
11 number SVSP-06-00380 was bypassed under Cal. Code Regs. tit. 15, § 3084.5(b). (See Medina  
12 Decl. ¶ 7.)

13 On February 22, 2006, the second level of review for appeal number SVSP-06-00380 was  
14 partially granted, a modification order was requested, and the response was sent to the Plaintiff.  
15 (See Medina Decl. ¶ 8, Ex D.)

16 On March 8, 2006, the modification order for FC05-04-0049 ordered the Rules Violation  
17 Report retyped and reissued within fifteen days. (See Medina Decl. ¶ 9, Ex E.)

18 Under the modification order, the Rules Violation Report was reissued and reheard. The  
19 reissued Rules Violation Report number is C06-03-0012R and was reheard on November 17,  
20 2006. On December 1, 2006, the final Rules Violation Report, number C06-03-0012R, was sent  
21 to Plaintiff with the finding that he was guilty of battery of a peace officer. (See Medina Decl. ¶  
22 10, Ex F.)

23 On January 3, 2007, Plaintiff appealed the reissued Rules Violation Report. The appeal  
24 number is institutional log number SVSP-D-07-00073. It was screened out for untimeliness.  
25 The appeal was not filed within fifteen working days of the event as required by Cal. Code Regs.  
26 tit. 15, § 3084.6(c). (See Medina Decl. ¶ 11, Ex A, p.16.)

27 Regardless of the untimeliness, Defendant later agreed to accept Plaintiff's late appeal,  
28 institutional log number SVSP-D-07-00073, at the second level of review and have the merits

1 addressed by a second level appeal response. To date, Plaintiff neither accepted the offer nor  
2 submitted the appeal, SVSP-D-07-00073, for second level review. (*See* Medina Decl. ¶ 12.)

3 Plaintiff filed an appeal bearing the institutional log number SVSP-D-07-01415, the  
4 appeal at issue in this matter. This appeal was received by the inmate appeals office on March  
5 30, 2007. The appeal alleges that Defendant improperly screened out the prior RVR appeal,  
6 SVSP-D-07-00073. The informal level of review was bypassed under Cal. Code Regs. tit. 15, §  
7 3084.5(b). The appeal was forwarded to the Chief Deputy Warden for review at the first level:  
8 On April 5, 2007, it was rejected and screened out at the first level of review by the Chief  
9 Deputy Warden because the RVR appeal was untimely. (*See* Medina Decl. ¶ 13, Ex A, p. 17.)

10 There are numerous examples in the past two years and around the time of the appeal at  
11 issue where Defendant, as the SVSP inmate appeals coordinator, processed and granted or  
12 granted in part appeals submitted by Plaintiff at the first and second levels of review. (*See*  
13 Medina Decl. ¶ 14-25, Ex A, p.11-20.)

14 There is no record of the appeal at issue, SVSP-C-07-01415, being sent to, accepted,  
15 reviewed, or screened out at the Director's Level of appeal by Plaintiff. Appeal SVSP-C-07-  
16 01415, therefore, was not exhausted at the Director's Level. (*See* Grannis Decl. ¶ 8, Ex A.)

### 17 ARGUMENT

18 This action should be dismissed for failure to exhaust administrative remedies as required  
19 by the PLRA and for failure to state a claim for relief against Defendant.

#### 20 I. THE PRISON LITIGATION REFORM ACT'S EXHAUSTION REQUIREMENT

21 The PLRA requires that inmates exhaust their available administrative remedies before  
22 filing civil rights actions in federal courts. 42 U.S.C. § 1997e(a); *Porter v. Nussle*, 534 U.S. 516,  
23 524 (2002); *McKinney v. Carey*, 311 F.3d 1198, 1199-1201 (9th Cir. 2002). Therefore,  
24 "[c]ompliance with prison grievance procedures . . . is all that is required by the PLRA to  
25 "properly exhaust." *Woodford v. Ngo*, 126 S. Ct. 2378, 2384 (2006). The Supreme Court also  
26 affirmed that a prisoner must properly proceed through each stage of the administrative process,  
27 to obtain a final Director's level of review in order to bring a federal lawsuit. *Id.* at 2387.

28 When an inmate-plaintiff fails to exhaust, a defendant may file a non-enumerated Rule



12(b) motion to dismiss. *Wyatt*, 315 F.3d at 1119-20 (9th Cir. 2003). In ruling on such a motion a court may look beyond the pleading to decide disputed issues of fact. *Id.* The proper disposition for failure to exhaust is dismissal without prejudice. *Id.* at 1120.

## 4 II. CALIFORNIA'S INMATE APPEALS PROCESS

5 The grievance process in the State of California allows inmates in California prisons to  
6 appeal "any departmental decision, action, condition, or policy which they can demonstrate as  
7 having an adverse effect upon their welfare." Cal. Code Regs. tit. 15, § 3084.1. To exhaust this  
8 process, before proceeding to federal court, an inmate must proceed four levels of appeal: (1)  
9 informal level; (2) first formal level; (3) second formal level; and (4) third formal level, also  
10 known as the Director's level review. *Id.* § 3084.5. A decision at the third formal level, or  
11 Director's level of review, is final and constitutes exhaustion of available administrative  
12 remedies. *Id.* §§ 3084.1(a), 3084.5(e)(2).

13 To initiate the inmate appeal process, inmates must use a form CDC 602 (Form) to  
14 describe the problem complained of and the action requested. (Cal. Code Regs. tit. 15, § 3084.2;  
15 *See Grannis Decl.* ¶ 2.) The inmate must submit the Form to the Appeals Coordinator within  
16 fifteen working days (three weeks) of the action taken. *Id.* § 3084.6(c). An inmate's appeal may  
17 be screened out where the time limits for submitting the appeal are exceeded and the appellant  
18 had the opportunity to file within the prescribed time constraints, and when an appeal concerns  
19 an anticipated action or decision. *Id.* § 3084.3(c). The informal level is bypassed for allegations  
20 of staff misconduct. *Id.* §§ 3084.5(a)(3)(b).

## 21 III. PLAINTIFF FAILED TO EXHAUST ADMINISTRATIVE REMEDIES.

22 Plaintiff claims that Defendant Medina retaliated against him by not processing a prior  
23 RVR appeal because he was a "jailhouse lawyer" and submitted prior administrative appeals.  
24 (Compl., at 2(b) ¶ 5-9.)

25 On April 18, 2005, Plaintiff received a Rules Violation Report, number FC05-04-0049,  
26 for battery on a peace officer. On January 5, 2006, after the investigation, Plaintiff received the  
27 final Rules Violation Report finding that he was guilty of battery on a peace officer. (*See Medina*  
28 *Decl.* ¶ 5, Ex B.)

1 Plaintiff appealed the Rules Violation Report, number FC05-04-0049, for battery on a  
2 peace officer. (See Medina Decl. ¶ 6, Ex C.) The first level of review for appeal number SVSP-  
3 06-00380 was bypassed under Cal. Code Regs. tit. 15, § 3084.5(b). (See Medina Decl. ¶ 7.)

4 On February 22, 2006, the second level of review for appeal number SVSP-06-00380 was  
5 partially granted, a modification order requested, and the response sent to the Plaintiff. (See  
6 Medina Decl. ¶ 8, Ex D.)

7 On March 8, 2006, the modification order for FC05-04-0049 ordered the Rules Violation  
8 Report retyped and reissued within fifteen days. (See Medina Decl. ¶ 9, Ex E.)

9 Under the modification order, the Rules Violation Report was reissued and reheard. The  
10 reissued Rules Violation Report number is C06-03-0012R and was reheard on November 17,  
11 2006. On December 1, 2006, the final Rules Violation Report, number C06-03-0012R, was sent  
12 to Plaintiff finding him guilty of battery of a peace officer. (See Medina Decl. ¶ 10, Ex F.)

13 On January 3, 2007, inmate Hollis appealed the reissued Rules Violation Report. The  
14 appeal number is institutional log number SVSP-D-07-00073. It was screened out for  
15 untimeliness. The appeal was not filed within fifteen working days of the event as required by  
16 Cal. Code Regs. tit. 15, § 3084.6(c). (See Medina Decl. ¶ 11, Ex A, p.16.)

17 Regardless of the untimeliness, Defendant later agreed to accept Plaintiff's late appeal, at  
18 the second level of review and have the merits addressed by a second level appeal response. To  
19 date, Hollis has neither accepted the offer nor submitted the appeal for review. (See Medina Decl.  
20 ¶ 12.)

21 Plaintiff filed an appeal bearing the institutional log number SVSP-D-07-01415, another  
22 appeal at issue in this matter. This appeal was received by the inmate appeals office on March  
23 30, 2007. The informal level of review was bypassed under Cal. Code Regs. tit. 15, § 3084.5(b).  
24 The appeal was forwarded to the Chief Deputy Warden for review at the first level. On April 5,  
25 2007, it was rejected and screened out at the first level of review by the Chief Deputy Warden  
26 because it was determined that Defendant had properly screened out the prior RVR appeal for  
27 untimeliness. (See Medina Decl. ¶ 13, Ex A, p. 17.)

28 Despite the late inmate-filed inmate appeal, Defendant agreed to allow the Plaintiff's



1 prior appeal to be considered at the second level of review. (*See* Medina Decl. ¶ 12.)

2 There is no record of SVSP-C-07-01415 being sent to, accepted, reviewed or screened out  
 3 at the Director's Level of appeal by Plaintiff. Therefore, appeal SVSP-C-07-01415 was not  
 4 exhausted at the Director's Level. (*See* Grannis Decl. ¶ 8, Ex A.) Plaintiff provides no  
 5 substantiation of the claim to the third level of appeal, such as an appeal log number. And, the  
 6 Declaration of N. Grannis shows that no appeal was submitted. (*See* Grannis Decl. ¶ 8, Ex A.)  
 7 By Plaintiff's own admission, he failed to exhaust his administrative remedies to the requisite  
 8 third level of review. (Compl., at 2, I(4).) Exhaustion is a indispensable condition precedent to  
 9 initiating an action in federal court. *McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir. 2002);  
 10 *Medina-Claudio v. Rodriguez-Mateo*, 292 F.3d 31, 36 (1st Cir. 2002).

11 Plaintiff claims that Defendant retaliated against him by improperly screening his appeal.  
 12 First, Defendant did not screen the appeal at issue, the Chief Deputy Warden screened it. (*See*  
 13 Medina Decl. ¶ 13.) Second, since that time, Defendant agreed to review the prior RVR appeal  
 14 at the second level of review, which was the impetus for Plaintiff's appeal at issue and the  
 15 complaint. (*See* Medina Decl. ¶ 12.) Plaintiff never submitted appeal SVSP-D-07-0073 for  
 16 review. Third, Plaintiff's records show that during the last two years and around the time of the  
 17 appeal at issue, Plaintiff successfully submitted appeals that Defendant processed and granted or  
 18 granted in part at the first and second levels of review. (*See* Medina Decl. ¶ 14-25, Ex A, p.11-  
 19 20.) Therefore, it is unlikely that Defendant is retaliating against Plaintiff since many of his other  
 20 appeals have been considered. Fourth, Plaintiff failed to exhaust his administrative remedies to  
 21 the requisite third level of review by his own admission. (Compl., at 2, I(4).)

22 Since Plaintiff failed to exhaust his administrative remedies through the requisite third  
 23 level of review, the complaint should be dismissed under *Woodford v. Ngo*, 126 S. Ct. 2378,  
 24 2384 (2006). That case permits the rejection of untimely administrative appeals and dismissal of  
 25 inmate cases for failure to properly exhaust administrative remedies. *Id.* at 2382, 2387.

26 **IV. PLAINTIFF FAILS TO STATE A CLAIM FOR RELIEF AGAINST THE**  
 27 **DEFENDANT.**

28 Plaintiff's sole basis for relief is that Medina allegedly retaliated against him by screening

1 out a prior RVR appeal. (Compl., at 2(b)-3(c).) "[A prison] grievance procedure is a procedural  
2 right only, it does not confer any substantive right upon the inmates." *Buckley v. Barlow*, 997  
3 F.2d 494, 495 (8th Cir. 1993) (citing *Azeez v. DeRobertis*, 568 F. Supp. 8, 10 (N.D. Ill. 1982));  
4 *Sandin v. Conner* 515 U.S. 472, 484 (1995) (Liberty interests created by state law are generally  
5 limited to freedom from restraint which "imposes atypical and significant hardship on the inmate  
6 in relation to the ordinary incidents of prison life.") No liberty interest exists in processing of  
7 appeals because there is no entitlement to a specific grievance procedure. *Ramirez v. Galaza*,  
8 334 F.3d 850, 860 (9th Cir. 2003); *Massey v. Helman*, 259 F.3d 641, 647 (7th Cir. 2001.)  
9 (existence of grievance procedure confers no liberty interest on prisoner); *See also Mann v.*  
10 *Adams*, 855 F.2d 639, 640 (9th Cir. 1988). "Hence, it does not give rise to a protected liberty  
11 interest requiring the procedural protections envisioned by the Fourteenth Amendment." *Azeez v.*  
12 *DeRobertis*, 568 F. Supp. at 10. The failure to process a grievance does not state a constitutional  
13 violation, and a prison official's involvement and actions in reviewing a prisoner's appeal cannot  
14 serve as a basis for liability under a § 1983 action. *Buckley*, 997 F.2d at 495.

15 Plaintiff does not allege that the prison has no grievance procedure. And, in fact, the  
16 record demonstrates that a procedure for grievances exists. Moreover, to the extent Plaintiff  
17 asserts that Defendant failed to follow state law requirements as to processing an inmate  
18 grievance, such a claim is not cognizable under 42 U.S.C. § 1983. *See Ove. v. Gwinn*, 264 F.3d  
19 817, 824 (9th Cir. 2001).

20 "There is no constitutionally protected right to an appeals process and there is no  
21 constitutionally protected right to a particular outcome." *Lewis v. Tilton*, 2008 WL 282381 at 4  
22 (E.D. Cal. January 31, 2008). "Even if the interference with plaintiff's use of the prison  
23 grievance system occurred in retaliation for his prior use of that system, defendants' actions in  
24 interference with and/or reviewing, or issuing decisions on the appeals do not provide a basis  
25 upon which to impose liability under § 1983." *Id.* Accordingly, Plaintiff's claim that Defendant  
26 retaliated against him by improperly screening or processing a prior RVR appeal should be  
27 dismissed, because it does not rise to a level of a protected constitutional right and fails to state a  
28 cognizable claim for relief under 42 U.S.C. § 1983.



1 **V. DEFENDANT IS ENTITLED TO QUALIFIED IMMUNITY.**

2 "(G)overnment officials performing discretionary functions . . . are shielded from liability  
3 for civil damages insofar as their conduct does not violate clearly established statutory or  
4 constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*,  
5 457 U.S. 800, 818 (1982). The Supreme Court has clarified that, in applying this standard, the  
6 threshold inquiry is whether the facts alleged show a violation of a constitutional right. *Saucier*  
7 *v. Katz*, 121 S.Ct. 2151, 2156 (2001). If the answer is no, there is no necessity for further inquiry  
8 and qualified immunity is established. *Id.* On the other hand, if the answer is yes, the court must  
9 further determine whether the contours of that right were sufficiently clear to put defendant on  
10 notice that his conduct under the circumstances was unlawful. *Id.* If the right was not clearly  
11 established, defendant is entitled to qualified immunity. *Id.* at 2156-57. Therefore, a prison  
12 official who acts under an objectively reasonable, albeit mistaken, belief that his actions were  
13 lawful, he is entitled to the protection of qualified immunity. *Hunter v. Bryant*, 502 U.S. 224,  
14 227 (1991).

15 In this case, Plaintiff has failed to allege facts which show a violation of a constitutional  
16 right by Defendant. As set forth above, no liberty interest exists in processing of appeals because  
17 there is no entitlement to a specific grievance procedure and therefore such allegations do not  
18 state a cognizable claim for a violation of his federal constitutional rights. *Ramirez v. Galaza*,  
19 334 F.3d 850, 860 (9th Cir. 2003); *Mann v. Adams*, 855 F.12d 639m 640 (9th Cir.1988) (holding  
20 no constitutional right to administrative appeal or grievance system). Consequently, under  
21 *Saucier*'s first prong, Defendant is entitled to qualified immunity on Plaintiff's claims under §  
22 1983.

23 Defendant also acted reasonably when processing Plaintiff's appeal. Defendant did not  
24 personally screen-out the appeal. The appeal was given to the Associate Warden to review. (*See*  
25 *Medina Decl.* ¶ 13.) Since Defendant did not screen the appeal at issue, which was forwarded to  
26 the Chief Deputy Warden for review at the first level, qualified immunity applies. The law  
27 permits rejection of appeals for untimeliness. *Woodford v. Ngo*, 126 S. Ct. 2378, 2382 (2006).

28 //

**CONCLUSION**

Defendant respectfully requests that the court dismiss this action since Plaintiff failed to exhaust his available administrative remedies through the requisite third level, failed to state a claim for relief against Defendant, and requests qualified immunity for Defendant's actions.

Dated: February 22, 2008

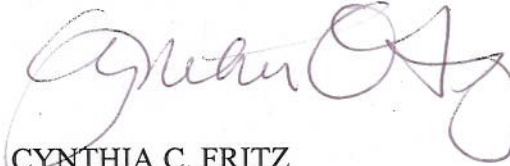
Respectfully submitted,

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